Datuk Seri Poh Geok Seng & Ors (for and on behalf of Lembaga Pengurus/Pengelola Sekolah SJK(C) Pay Fong 1 Melaka, beneficiaries for the trust created on trust properties) v Pang Siew Fian & Anor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS M-01(IM)(NCvC)-547–09 OF 2021, M-01(IM)(NCvC)-553–09 OF 2021 AND M-02(IM)(NCvC)-570–10 OF 2021

HAS ZANAH MEHAT, CHE MOHD RUZIMA AND SEE MEE CHUN JJCA

9 OCTOBER 2023

Civil Procedure — Locus standi — Action by school's board of governors ('BOG') — Whether BOG was legal entity or had capacity to sue or be sued under Education Act 1996 ('EA 1996') — Whether EA 1996 had removed powers that governors and managers had under EA 1961 to administer revenues or properties of educational institutions

The appellants in Appeal 547 herein, who pleaded that they were suing for and on behalf of the board of governors ('BOG')/administrators of the Pay Fong 1 Chinese school in Melaka, had sued the two respondents in the High Court in their capacities as trustees of lands which they held for the use and benefit of the school. Although the dispute concerned the trust properties, the parties mutually agreed at the outset to allow the High Court to decide, pursuant to O 33 r 2 of the Rules of Court 2012 ('the ROC'), the preliminary issues of whether the BOG was a legal entity under ss 2 and 53 of the Education Act 1996 ('the EA 1996') and had the capacity to sue or be sued and if the answer was in the negative, whether the Attorney General could by consent granted under s 9(1) of the Government Proceedings Act 1956, confer such legal capacity on the BOG if none existed under the law. The High Court answered both questions in the negative and dismissed the appellants' claim and the respondents' counterclaim resulting in the instant appeals against that decision. After studying the provisions of the Education Ordinance 1957 and thereafter the Education Act 1961 ('the EA 1961') and the EA 1996, the High Court held that the legislature intended for the BOG to be merely a management body of an educational institution without having a legal personality of its own and the capacity to sue or be sued. The appellants in Appeal 570 agreed not to proceed with their appeal if Appeal 547 was dismissed.

Held, unanimously dismissing Appeals 547 and 553 and striking out Appeal 570:

(1) The BOG was created by the Education Act 1996 ('the EA 1996') solely to administer and manage an educational institution. This meant the Pay Fong School was required to have an instrument of government which provided for the constitution of a BOG to administer or manage the school in a manner not inconsistent with the EA 1996 and any regulations made thereunder, and to do nothing beyond that. This was to be contrasted to the previous position in s 2 of the EA 1961 where there were governors and managers who were authorised to administer the revenues or properties of educational institutions (see paras 35–40).

(2) In the pre-EA 1996 legislation, there was a local education authority which had a body corporate status and could sue and be sued. The EA 1996 did away with that authority. Of significance was that if the previous local education authority could have been conferred such status and powers, the same could have been conferred on the BOG but that was not done under the EA 1996. Nothing in the EA 1996 clothed the BOG as a legal entity and conferred upon it the capacity to sue or be sued. Being a creature of statute, the BOG could only do what it was authorised to do by the EA 1996, directly or by implication (see paras 41 & 43–44).

(3) Under the instrument of government, the BOG managed the finances of the board, ensured that the properties of the school were properly preserved, appointed trustees to hold immovable properties of the board and had bank accounts opened in its name. But these provisions did not suffice to show an intention to render the BOG a legal entity. They were incidental to the BOG's functions to manage the school. In fact, management of school property was vested in four trustees and not in the BOG per se although such property could remain that of the BOG. As to the BOG entering into agreements in its name with building/construction contractors, this did not necessarily make the BOG a legal entity when the EA 1996 did not confer such a status on it. This meant such contracts were entered into in the personal capacities of the members (see paras 52–53).

(4) Since the preliminary issues on which determination of the court under O 33 r 2 of the ROC was sought with the consent of all the parties and the issues were drafted by the counsels concerned, the appellants could not now, when the issues had been answered against them, change tack and say that they had locus to sue in their representative capacities such that the matter had to proceed to trial. The court was not called upon, in the event the preliminary issues were answered in the negative, to further consider if the appellants had the locus to maintain the proceedings in their representative capacities, even if that was how the suit was pleaded. Here, the issue related to the BOG's capacity to sue, giving rise to the

maintainability of the suit, such that when the issue was answered in the negative, the only option was to dismiss the action under O 33 r 5 of the ROC (see paras 68, 71 & 76).

[Bahasa Malaysia summary

Perayu-perayu dalam Rayuan 547 di sini, yang merayu bahawa mereka menyaman untuk dan bagi pihak lembaga pengelola ('LP')/pentadbir sekolah Cina Pay Fong 1 di Melaka, telah menyaman kedua-dua responden di Mahkamah Tinggi dalam kapasiti sebagai pemegang amanah tanah yang mereka pegang untuk kegunaan dan faedah sekolah. Walaupun pertikaian tersebut membabitkan harta amanah, kedua-dua pihak bersetuju pada awalnya untuk membenarkan Mahkamah Tinggi membuat keputusan, menurut A 33 k 2 Kaedah-Kaedah Mahkamah 2012 ('KKM'), isu-isu awal sama ada LP adalah sebuah entiti undang-undang di bawah ss 2 dan 53 Akta Pendidikan 1996 ('AP 1996') dan mempunyai kapasiti untuk menyaman atau disaman dan jika jawapannya adalah negatif, sama ada Peguam Negara boleh dengan keizinan yang diberikan di bawah s 9(1) Akta Prosiding Kerajaan 1956, memberikan kapasiti undang-undang tersebut kepada LP jika tiada satu pun wujud di bawah undang-undang. Mahkamah Tinggi menjawab kedua-dua soalan secara negatif dan menolak tuntutan perayu dan tuntutan balas responden menyebabkan rayuan semasa terhadap keputusan tersebut. Selepas mengkaji peruntukan Ordinan Pelajaran 1957 dan selepas itu Akta Pendidikan 1961 ('AP 1961') dan AP 1996, Mahkamah Tinggi memutuskan bahawa badan perundangan berhasrat untuk LP hanya menjadi badan pengurusan institusi pendidikan tanpa mempunyai keperibadian undang-undang sendiri dan keupayaan untuk menyaman atau disaman. Perayu-perayu dalam Rayuan 570 bersetuju untuk tidak meneruskan rayuan mereka jika Rayuan 547 ditolak.

Diputuskan, sebulat suara menolak Rayuan 547 dan 553 dan membatalkan Rayuan 570:

(1) LP diwujudkan oleh Akta Pendidikan 1996 ('AP 1996') semata-mata untuk mentadbir dan mengurus institusi pendidikan. Ini bermakna Sekolah Pay Fong dikehendaki mempunyai instrumen kerajaan yang memperuntukkan perlembagaan LP untuk mentadbir atau mengurus sekolah dengan cara yang tidak selaras dengan AP 1996 dan mana-mana peraturan yang dibuat di bawahnya, dan tidak melakukan apa-apa selain daripada itu. Ini berbeza dengan kedudukan sebelumnya dalam s 2 AP 1961 di mana terdapat pengelola dan pengurus yang diberi kuasa untuk mentadbir hasil atau hartanah institusi pendidikan (lihat perenggan 35–40).

(2) Dalam perundangan pra-AP 1996, terdapat pihak berkuasa pendidikan tempatan yang mempunyai status badan korporat dan boleh menyaman dan disaman. AP 1996 menghapuskan kuasa tersebut. Apa yang penting

adalah jika pihak berkuasa pendidikan tempatan sebelum ini boleh diberikan status dan kuasa sedemikian, perkara yang sama boleh diberikan kepada LP tetapi itu tidak dilakukan di bawah AP 1996. Tiada apa-apa dalam AP 1996 yang meletakkan LP sebagai entiti undang-undang dan diberikan kepadanya keupayaan untuk menyaman atau disaman. Sebagai alat statut, LP hanya boleh melakukan apa yang dibenarkan untuk dilakukan oleh AP 1996, secara langsung atau secara tersirat (lihat perenggan 41 & 43–44).

(3) Di bawah instrumen kerajaan, LP menguruskan kewangan lembaga, memastikan hartanah sekolah dipelihara dengan baik, melantik pemegang amanah untuk memegang harta tak alih lembaga dan membuka akaun bank atas namanya. Tetapi peruntukan ini tidak mencukupi untuk menunjukkan niat untuk menjadikan LP sebagai entiti yang sah. Mereka selaras dengan fungsi LP untuk menguruskan sekolah. Malah, pengurusan hartanah sekolah terletak pada empat pemegang amanah dan bukan pada LP semata-mata walaupun hartanah tersebut boleh kekal sebagai milik LP. Berkenaan LP yang memeterai perjanjian atas namanya dengan kontraktor bangunan/pembinaan, ini tidak semestinya menjadikan LP sebagai entiti sah apabila AP 1996 tidak memberikan status sedemikian kepadanya. Ini bermakna kontrak sedemikian dibuat mengikut kapasiti peribadi ahli (lihat perenggan 52–53).

(4) Memandangkan isu-isu awal yang mana penentuan mahkamah di bawah A 33 k 2 KKM telah diminta dengan persetujuan semua pihak dan isu-isu itu telah dirangka oleh peguam yang berkenaan, perayu-perayu tidak boleh sekarang, apabila isu-isu itu telah telah dijawab terhadap mereka, menukar taktik dan mengatakan bahawa mereka mempunyai lokus untuk menyaman dalam kapasiti perwakilan mereka supaya perkara itu perlu diteruskan ke perbicaraan. Mahkamah tidak dipanggil, sekiranya isu awal dijawab secara negatif, untuk mempertimbangkan lebih lanjut sama ada perayu mempunyai lokus untuk mengekalkan prosiding dalam kapasiti perwakilan mereka, walaupun ia adalah cara saman diplidkan. Di sini, isu yang berkaitan dengan keupayaan LP untuk menyaman, dalam menimbulkan kebolehpertahanan saman tersebut, sehingga apabila isu itu dijawab secara negatif, satu-satunya pilihan adalah untuk menolak tindakan di bawah A 33 k 5 KKM (lihat perenggan 68, 71 & 76).]

Cases referred to

Ann Joo Steel Berhad v Tenaga Nasional Berhad & Ors [2016] MLJU 588; [2017] 2 CLJ 199, HC (refd)

Ann Joo Steel Bhd v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal [2020] 1 MLJ 689; [2019] 9 CLJ 153, FC (refd)

Chen Cheng and another v Central Christian Church and another appeal [1995] 3 SLR(R) 806, CA (distd)
Krishnan Rajan a/l N Krishnan v Bank Negara Malaysia & Ors [2003] 1 MLJ 149, HC (distd)
Lee Tak Suan & Anor v Tunku Dato Seri Shahabudin bin Tunku Besar Burhanuddin & Ors [2009] 4 MLJ 759, FC (distd)
Penang Development Corporation v Teoh Eng Huat & Anor [1992] 1 MLJ 749, HC (refd)
S & M Shopping Arcade Sdn Bhd v CH Williams, Talhar and Wong Sdn Bhd [2007] 7 MLJ 468, HC (refd)
Silvam a/l Sellapan (acting as Chairman for the Lembaga Pengelola Sekolah Jenis Kebangsaan (T) Vivekananda, Petaling Jaya) v Tamil Selvam a/l Velusamy & Ors [2023] 2 MLJ 279; [2023] 3 CLJ 371, CA (refd)
Silvam a/l Sellapan (suing as Chairman of Board of Governors of Sekolah Jenis Kebangsaan (Tamil) Vivekananda, Petaling Jaya) & Anor v Tamilselvam a/l Velusamy & Ors [2020] MLJU 1800; [2020] 1 LNS 1561, HC (refd)
Tan Sri Datuk Tee Hock Seng (mendakwa sebagai Pengerusi Lembaga Pengelola Sekolah Menengah Jenis Kebangsaan Confucian) v Dato' Ng Wee Yiew (didakwa sebagai Pengerusi Lembaga Pengelola Sekolah Menengah Confucian (Persendirian) [2018] MLJU 1155, HC (distd)
The Taff Vale Railway Company v The Amalgamated Society of Railway Company [1901] 1 QB 170, HL (distd)

Legislation referred to

Education Act 1961 (repealed by Education Act 1996) ss 2, 27, 106, 109
Education Act 1996 ss 2, 53, 53(1), (2), 55, 59, 62(2)
Education Ordinance 1957 (repealed by Education Act 1996) ss 13, 14
Government Proceedings Act 1956 s 9(1), (1)(c)
Rules of Court 2012 O 33 rr 2, 5
Societies Act 1966 s 7
Societies Act 1966 [SG]
Trade Union Acts of 1871 and 1876 [UK]

Appeal from: *Datuk Seri Poh Geok Seng & Ors v Pang Siew Fian & Anor* [2022] MLJU 882 (High Court, Melaka)

Ambiga Sreenevasan (with Ng Kong Peng, Sarah Ho Yixin, Yok Jiang Lin and Tan Yoon Chang) (KP Ng & Amardas) in Appeal No M-01(IM)(NCvC)-547–09 of 2021 for the appellants.
Mohamad Al Saifi Hashim (with Nurul Farhana bt Khalid and Nor Aqilah bt Abdul Halim) (Federal Counsel, Attorney General's Chambers) in Appeal No M-01(IM)(NCvC)-553–09 of 2021 for the appellant.
Cyrus Das (with Jagjit Singh, Yap Bell Pung, Tan Cheng Kiat, Joshua Vijayan Dhamaraj and Adre Wee Heng Leong) (Yap Koon Roy & Assoc) in Appeal No M-02(IM)(NCvC)-570–10 of 2021 for the appellants.

Cyrus Das (with Jagjit Singh, Yap Bell Pung, Tan Cheng Kiat, Joshua Vijayan Dhamaraj and Adre Wee Heng Leong) (Yap Koon Roy & Assoc) in Appeal Nos M-01(IM)(NCvC)-547–09 of 2021 and M-01(IM)(NCvC)-553–09 of 2021 for the respondents.

Ambiga Sreenevasan (with Ng Kong Peng, Sarah Ho Yixin, Yok Jiang Lin and Tan Yoon Chang) (KP Ng & Amardas) in Appeal No M-02(IM)(NCvC)-570–10 of 2021 for the first, second, third and fourth respondents.

Mohamad Al Saifi Hashim (with Nurul Farhana bt Khalid and Nor Aqilah bt Abdul Halim) (Federal Counsel, Attorney General Chambers) in Appeal No M-02(IM)(NCvC)-570–10 of 2021 for the fifth respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] There are three related appeals, consolidated and heard together. Parties will be referred to as in the High Court.

[2] Appeal 547 is the appeal by the plaintiffs; Appeal 553 is the appeal by the Attorney General ('AG') as the fifth defendant and Appeal 570 is the appeal by the rest of the defendants.

[3] All references to enclosures are to Appeal 547 except where otherwise stated.

[4] The appeals relate to two preliminary issues which the plaintiffs and defendants had consented before the Court of Appeal on 17 August 2020 ('CA order') to be determined pursuant to O 33 rr 2 and 5 of the Rules of Court 2012 ('the RC 2012'). This was also consented to by the AG. Subsequently the defendants filed encl 48 on 15 April 2021. The CA order had arisen from the defendants' appeal against the dismissal of their striking out application of this suit.

THE PARTIES

[5] The plaintiffs are the current members of the school Board of SJK (C) Pay Fong 1 ('Pay Fong School'). They have filed the suit in their names in their representative capacities as members of the Pay Fong School Board for and on its behalf.

[6] The defendants (other than the fifth defendant) are the registered proprietors of Lot 87 and Lot 831 ('trust properties') and the current trustees of the trust properties.

[7] The fifth defendant is the AG, in relation to the consent granted pursuant to s 9(1) of the Government Proceedings Act 1956 ('the GPA'). **A**

THE BACKGROUND FACTS

[8] The subject matter of the dispute relates to the status of two pieces of land, namely Lot 87 and Lot 831 which are said to be held in trust for the use and benefit of Pay Fong School. The trust in question was established in 1913. **B**

[9] On or about 7 July 1913, a Chinese medium primary school known as Pay Fong Lower and Higher Primary School was established. In or about 1958 the school was renamed and is now known as SJK (C) Pay Fong 1 (Pay Fong School). **C**

[10] The trust properties were subsequently donated and vested in the trustees. **D**

[11] In or about 1958 Pay Fong School and the respective school Boards of five other schools formed the joint Board. The joint Board was dissolved around May 2010. **E**

[12] Over the years, there has been seven sets of trustees for the trust properties and the defendants are the current seventh set of trustees.

F

[13] Pay Fong School has since relocated to Lot 9245 sometime in November 2011. This means that Lot 831 is no longer utilised as a school while Lot 87 is being used as a car park. The dispute started when one Lim Guan Swee, who has since passed on, wrote to Pay Fong School, on behalf of the trustees, for vacant possession of Lot 831. **G**

[14] There was also an earlier suit ('Suit 24') filed by the plaintiffs for a declaration that Pay Fong School is the beneficiary of the trust properties and that the defendants be removed as trustees and for the appointment of two named persons as trustees. Suit 24 was withdrawn and this current suit was filed. The AG's consent pursuant to s 9(1) of the GPA was said to have been obtained. **H**

[15] There is also a counterclaim by the defendants for a declaration, inter alia, that the trust is charitable trust for the advancement of education in Chinese medium education in Melaka and that the consent of the AG is null and void. **I**

A THE PRELIMINARY ISSUES IN THE CA ORDER

[16] In relation to the preliminary issues, the CA order (encl 13/52–56) provided, inter alia:

B 3) That the following preliminary issues be determined by preliminary trial pursuant to Order 33 Rules 2 and 5 of the Rules of Court 2012:

(a) Whether the SJK (C) Pay Fong 1 Melaka Board of Governors is a legal entity under Sections 2 and 53 of the Education Act 1996 with the legal capacity to sue or be sued in this case; and

C

(b) If the answer is in the negative, whether the Attorney General could, by the consent granted under s 9(1) of the Government Proceedings Act 1956, confer such a legal capacity on it if none exists under the law.

D **[17]** Both issues were answered in the negative resulting in the plaintiffs' claim and the defendants' counterclaim being dismissed leading to the ensuing appeals.

[18] On appeal before us, we had dismissed the appeals of the plaintiffs and E the AG and struck out the appeal of the defendants.

[19] Insofar as the second issue on consent of the AG is concerned, we understand there is no leave to appeal on our dismissal of the AG's appeal. Hence our grounds are only confined to the issue of entity and legal capacity of F the Pay Fong School Board of Governors.

DECISION OF THE HIGH COURT ('HC')

[20] The grounds of judgment of the HC can be found in encl 8/12–67.

G

[21] The HC reminded himself as follows:

38. In the present case I remind myself that the parties had consented that the preliminary issues in this present action be determined by way of O 33 rr 2 and 5 of the ROC 2012. Further I find that the substantive issue as to whom is the H beneficiary of the endowment is not within the scope of the issues posed. In any event I am of the view that in this case the issue of the 'legal capacity' of the Board must be determined first before the question of who the beneficiaries are can be considered.

I **[22]** On the issue of legal capacity, the HC was of the view that the legislative history of ss 2 and 53 of the Education Act 1996 was essential in the interpretation of these sections. The Education Ordinance 1957 ('the EO') and the Education Act 1961 ('the EA 1961') were considered where in both legislation there was a local education authority which was a body corporate

able to sue and be sued. There was also s 27 of the EA 1961 where there was to be an instrument of government for every educational institution constituting a Board of Governors for the management of the institution in a manner not inconsistent with EA 1961.

[23] When the Education Act 1996 ('the EA 1996') came into force, the local educational authority was done away with but not the Board of Governors and the instrument of government. The HC then stated as follows in para 70:

> 70. This court is of the view that if the Legislature had intended the Board of Governors to have a legal personality they would have expressly stated that the Board 'shall be a body corporate' and 'may sue and be sued' just as was done in respect of the local education authority in the EA 1961.

[24] The HC stated that the Board of Governors being a creature of statute can only act within the four walls of the statute. Further, legal capacity cannot be implied into ss 2 and 53 of the EA 1996.

[25] It was also found that the fact of the second plaintiff entering into construction contracts in respect of Pay Fong School did not mean the Board had legal capacity and such would have been entered in the personal capacity.

[26] The HC had relied heavily on two High Court cases of *Silvam a/l Sellapan (suing as Chairman of Board of Governors of Sekolah Jenis Kebangsaan (Tamil) Vivekananda, Petaling Jaya) & Anor v Tamilselvam a/l Velusamy & Ors* [2020] MLJU 1800; [2020] 1 LNS 1561 and *Tan Sri Datuk Tee Hock Seng (mendakwa sebagai Pengerusi Lembaga Pengelola Sekolah Menengah Jenis Kebangsaan Confucian) v Dato' Ng Wee Yiew (didakwa sebagai Pengerusi Lembaga Pengelola Sekolah Menengah Confucian (Persendirian)* [2018] MLJU 1155, to support his finding.

[27] At para 83, the HC concluded as follows:

> 83. It is obvious to me that the Legislature never had the intention to confer legal personality on the Board. From the examination of the relevant provisions in the EO 1957, EA 1961 and EA 1996 I find that true intention was to preserve the Board as a management body. Any other finding would be 'inconsistent with this Act' and which is expressly prohibited under s 53 of the EA 1996.

SUBMISSION OF THE PLAINTIFFS

[28] It was submitted by the plaintiffs that in determining whether the Board of Governors ('BOG') is a legal entity, one does not look only to the express provision of EA 1996 but the combined effect of all the provisions of the statute. This would require a consideration of other provisions such as ss 55, 59 and 62(2). Under the instrument of government, the BOG manages the

finances of the Board, ensures that the properties of the school are properly preserved, appoints trustees to hold immovable properties of the Board and has bank accounts opened in its name. The BOG has entered into agreements in its name with building/construction contractors. All these will point towards the BOG being recognised as a legal entity.

[29] Reference was made to the House of Lords case of *The Taff Vale Railway Company v The Amalgamated Society of Railway Company* [1901] 1 QB 170 where a trade union registered under the Trade Union Acts of 1871 and 1876 was held to be able to sue in its registered name despite the law not containing an express provision that the trade union may sue or be sued in its registered name.

[30] The Singapore Court of Appeal case of *Chen Cheng and another v Central Christian Church and another appeal* [1995] 3 SLR(R) 806 was similarly referred to. It had held that the question of whether a registered society could sue in its registered name was not decided by the express provision in the Societies Act alone but by the combined effect of all the provisions of the Act.

[31] Even if the BOG is not a legal entity, it may still sue in the names of its own officers or members. This was the case here, where the suit was brought 'untuk dan bagi pihak Lembaga Pengurus/Pengelola Sekolah SJK(C) Pay Fong 1 Melaka'.

Submissions of the defendants

[32] The defendants submitted that the plaintiffs had pleaded themselves as the representatives of the BOG of the School such that their claim stands and falls on this legal point.

[33] The legislative history of the education legislation in particular the EO and EA 1961 before EA 1996 was traced. Pre-EA 1996, there had been established a local education authority Board as a body corporate which may sue and be sued. This Board was abolished by EA 1996. With EA 1996, the BOG is only for the management of educational institutions such as the school. There has been a reduced scope where the administration of revenues or property was no more.

[34] There is nothing in ss 2 and 53 of the EA 1996 which provides the BOG with the legal capacity to initiate the suit. The BOG is a creature of EA 1996 and does not have any power to do anything save as the statute expressly provides for it. Reference was made to the cases of *Penang Development Corporation v Teoh Eng Huat & Anor* [1992] 1 MLJ 749.

OUR DECISION

[35] Although the subject matter of the disputes relates to a trust and trust properties, the issue really hinges on the determination of the preliminary issue of whether the BOG is a legal entity with legal capacity to sue and be sued.

Whether Pay Fong School Board of Governors (BOG) is a legal entity under ss 2 and 53 of the Education Act 1996 with the legal capacity to sue or be sued in this case

[36] It is clear that the BOG is created by statute namely, EA 1996. We refer to two specific sections of EA 1996 which the preliminary issue requires us to consider, namely ss 2 and 53.

[37] Section 2 defines a 'governor' in the following words:

> 'governor' means a person who is empowered under an instrument of government to administer or manage an educational institution;

[38] Section 53 in turn provides as follows:

> 53 Instrument of government for educational institutions
>
> (1) Subject to the provisions of this Act, every educational institution shall have an instrument of government.
>
> (2) Every instrument of government shall provide for the constitution of a Board of Governors, with a chairman, for the management of the educational institution by the governors in a manner not inconsistent with this Act and any regulations made under this Act.
>
> (3) Subsection (1) shall not apply to government educational institutions except a national-type school and schools to be determined by the Minister.
>
> (4) Every instrument of government shall be made, amended or revoked in such manner as may be prescribed.

[39] This provision relates to the instrument of government for educational institution where sub-s 53(1) requires every educational institution to have an instrument of government and sub-s 53(2) in turn requires every such instrument of government to provide for the constitution of a Board of Governors for the management of the educational institution. What it essentially means is that Pay Fong School is required to have an instrument of government which is mandated to have a Board of Governors where the governors are to administer or manage the School. The BOG is thus established to administer or manage Pay Fong School, and nothing beyond that.

[40] This is to be contrasted to the previous position in s 2 of the EA 1961 where we had governors and managers to do the following:

> 'governor' means any person who actively takes part in the administration of the revenues or property or in the management of an educational institution other than a primary school, not being a member of the approved staff of such institution;
>
> ...
>
> 'manager' means a person who actively takes part in the administration of the revenues or property or in the management of a primary school, not being a member of the approved staff of such school;

[41] The role then was wider, beyond the administration and management of an educational institution, to the realm of the administration of revenues and property. There was a distinction then between 'administration of revenue or property' and 'management'.

[42] We note too that in the pre-EA 1996 legislation of EO and EA 1961, there was a local education authority which was bestowed a body corporate status and which could sue and be sued. The relevant provisions are ss 13 and 14 of EO and ss 106 and 109 of the EA 1961. The local education authority was done away with in EA 1996. Of significance is that if the local education authority could expressly confer body corporate status and the capacity to sue and be sued, the same could have been conferred on the BOG, which was absent in EA 1961 and EA 1996.

[43] The attempt by the plaintiffs to draw a distinction between the functions and duties of the local education authority and BOG is without merit. This is because what is intended to be conveyed is that if the local education authority could be conferred body corporate status and the capacity to sue and be sued, the same could likewise have been conferred on the BOG.

[44] Being a creature of statute, the BOG is circumscribed by EA 1996. This is made clear in *Penang Development Corporation* at p 754 as follows:

> I recognise that statutory corporations are subject to the doctrine of ultra vires. They are mere creatures of the statutes creating them, and the law will not suppose that they were created for any purposes other than those which induced the Legislature to act (see Hart's *Introduction to the Law of Local Government and Administration*, (8th Ed) at pp 292–293).
>
> The doctrine of ultra vires as applied to statutory corporations has been well put by Lord Watson in *Baroness Wenlock v River Dee Co* thuswise at p 362:
>
> > Whenever the corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.

> Unlike a natural person who can in general do whatever he pleases so long as what he does is not forbidden by law or contrary to law, a statutory corporation can do only those things which it is authorised to do by statute, directly or by implication. If such a corporation acts otherwise than in this way its acts are ultra vires. There must in all cases be statutory authority for what is done, and that authority must either be expressly given or reasonably inferred from the language of an Act of Parliament.

[45] This means that a corporation created by an Act of Parliament can only do those things which it is authorized to do so by statute, directly or by implication. We find nothing in these provisions which clothes the BOG as a legal entity conferring upon it the legal capacity to sue and be sued.

[46] Closer to point, there are two cases which were relied by the HC and the defendants, which held that BOG is not a legal entity under EA 1996 namely *Tee Hock Seng* and *Silvam Sellapan*. At the time of decision, both were High Court cases where in *Tee Hock Seng* there was no appeal and *Silvam Sellapan* was affirmed by this court as reported in [2023] 2 MLJ 279; [2023] 3 CLJ 371, insofar as the issue of legal entity is concerned. This is contrary to the plaintiffs' submission that it was overturned by this court.

[47] At the High Court in *Silvam Sellapan*, this was said:

> [18] I am of the view that a BOG is not a legal person under EA 1996. My reasons are as follows:
>
> (1) According to s 2 of the EA 1996, a 'governor' means 'a person who is empowered under an instrument of government to administer or manage an educational institution'. A 'school' is an 'educational institution' as understood in s 2 of the EA 1996.
>
> > Reading together the definition of 'instrument of government' in s 2 of the EA 1996 with s 53(2) of the EA 1996, an 'instrument of government' 'shall provide for the constitution of a (BOG), with a chairman, for the management of the educational institution by the governors in a manner not inconsistent with (EA 1996) and any regulations made (EA 1996)'. Section 55 of the EA 1996 further provides that 'every educational institution shall be managed in accordance with its instrument of government'. It is clear that an 'instrument of government' of a BOG (BOG's Instrument of Government) under ss 53(2) and 55 of the EA 1996 only provides for a BOG's management of an educational institution and does not confer a legal personality on the BOG;
>
> (2) it is decided by Wan Ahmad Farid JC (as he then was) in the High Court case of *Tan Sri Datuk Tee Hock Seng (Suing as Chairman of Board of Governors of Sekolah Menengah Jenis Kebangsaan Confucian) v Dato' Ng Wee Yiew (Sued as Chairman of Board of Governors of Sekolah Menengah Confucian (Persendirian))* [2018] MLJU 1155, at [26] and [27], as follows:
>
> > [26] Learned counsel however, referred me to s 53 of the [EA (1996)]. Section 53

provides that every instrument of government shall provide for the constitution of a Board of Governors, with a chairman for the management of the educational institution. It, however, stops short of creating a legal entity in the name of the Board of Governors that may sue or be sued in its own name.

[27] It is for these reasons that I am inclined to hold that the plaintiff has failed to prove his capacity to initiate this proceeding ...

(3) by virtue of s 54(1) and (2) of the EA 1996, the Minister of Education (Minister) may make regulations for the establishment of a BOG and for the management of an educational institution by the BOG. The Minister is not empowered under s 54(1) and (2) of the EA 1996 to make regulations so as to confer a legal personality on a BOG;

(4) as explained in the above Part D(1), the school is not a legal entity under EO, EA [1961] and EA 1996. It will be absurd if a BOG is a legal person pursuant to EA 1961 when the school is not; and

(5) if this court decides that a BOG is a legal entity under EA 1996, the floodgates of litigation will be unnecessarily open to all BOG's in Malaysia to institute any suit.

[48] We now set out the relevant passages of the Court of Appeal which affirmed that finding. These are at paras 32, 39 and 42 as follows:

[32] The learned High Court judge also referred to various legislation governing the administration of schools in the past and now and held that a school is not a legal entity that can own land. We do not disagree with the decision of the High Court that a school is not a legal entity per se in whom land can be vested although that is what the State Authority did in this case when a separate title was finally issued. ...

...

[39] ... As the school is not a legal entity that can directly own property as found by the learned High Court judge ...

...

[42] The High Court held that the BOG and PTA are not legal entities that can file this action. It may well be that the BOG and PTA are not legal entities who can sue in their own names as found by the learned High Court judge ...

[49] With regard to *Tee Hock Seng*, the plaintiffs submitted there was no elaboration of why s 53 of the EA 1996 stopped short of making the BOG a legal entity and there was no consideration of the provisions of EA 1996 and the authorities such as *Taff Vale Railway* and *Chen Cheng*. Be that as it may, and even if *Tee Hock Seng* is not considered, we find that *Silvam Sellapan* has settled the issue of the BOG not being a legal entity.

[50] Even if we were to comb EA 1996 and consider the entire provisions of EA 1996 as urged by the plaintiffs, we are unable to pinpoint any provision that renders the BOG as a legal entity.

[51] The plaintiffs had drawn our attention to certain provisions in 'Suratcara Pengelolaan Sekolah Jenis Kebangsaan (C) Pay Fong 1' as contained in encl 13/74–92 which was said to show an intention to confer legal personality on the BOG. It was also submitted that the BOG has entered into agreements in its name with building/construction contractors.

[52] Firstly, it is not disputed that the school is managed in accordance with the aforesaid instrument of government. This is consistent with s 55 of the EA 1996 which provides as follows:

> 55 Educational institution to be managed by its instrument of government
>
> Subject to the other provisions of this Act and in particular the provisions as to exemption, every educational institution shall be managed in accordance with its instrument of government.

[53] Under the instrument of government, the BOG manages the finances of the Board, ensures that the properties of the school are properly preserved, appoints trustees to hold immovable properties of the Board and has bank accounts opened in its name. We find that these provisions do not suffice to show an intention to render the BOG a legal entity. These are incidental to the BOG's functions to manage the school. In fact, management of school property is vested in four trustees and not the BOG per se although such property can remain that of the BOG (para 3.1.1 of instrument of government).

[54] As to the BOG having entered into agreements in its name with building/construction contractors, we find this does not necessarily make the BOG a legal entity when EA 1996 did not confer such a status on it. This would mean such contracts were entered in the personal capacity of the members.

[55] The cases cited by the plaintiffs, in particular *Taff Vale Railway* do not assist them. At pp 439–440, this was said:

> ... It is quite true that a registered trade union is not a corporation, but it has a registered name and a registered office. The registered name is nothing more than a collective name for all the members. The registered office is the place where it carries on business. A partnership firm which is not a corporation, nor, I suppose, a legal entity, may now be sued in the firm's name. And when I find that the Act of Parliament actually provides for a registered trade union being sued in certain cases for penalties by its registered name, as a trade union, and does not say that the cases specified are the only cases in which it may be so sued, I can see nothing contrary to principle, or contrary to the provisions of the Trade Union Acts, in holding that a trade union may be sued by its registered name.

[56] Another passage at p 441 was referred:

> ... the power of suing and liability to be sued in the society's name is clearly and necessarily implied by the provisions of the statutes. If Farwell J had not carefully gone over and pointed out these provisions in his judgment, I should have thought it right now to do so, but I content myself by referring to what he has so well said. A registered trade union has an exclusive right to the name in which it is registered, a right to hold a limited amount of real estate and unlimited personal estate for its own use and benefit and the benefit of its members, the power of acting by its agents and trustees, and is liable to be sued for penalties, as it appears to me, in the society's name. I am clearly of opinion that these and the provisions generally of the statutes imply a liability on the society to be sued in its trade union name, and a privilege of thus suing.

[57] Further, at p 442, this was said:

> ... The very omission from the statute of any provision authorizing and directing that it shall sue and be sued in any other name than that given to it by its registration appears to me to lead to no other reasonable conclusion than that in so creating it, it was intended by the Legislature that by that name and by no other it should be known, and that for all purposes that name should be used and applied to it in all legal proceedings unless there was any other provision which militated against such a construction, as, for instance, in the case of trustees, by s 9 of the same Act, who hold real and personal property of the society. I may refer also to the effect of the rules with regard to the present registration. I find on page 91 of the Appendix that r 7(3) provides that the funds of every branch shall be the common property of the society. That being so, I do not see how it would be possible for these funds to be made applicable for remuneration or recompense or redress for any wrongful act done by a body of men like the society unless the society can be sued in the way in which it is proposed to sue them, and as I think it may be.

[58] *Taff Vale Railway* involved a registered trade union with the right to hold a limited amount of personal estate and unlimited personal estate for its own use and benefit and the benefit of its members. The context where the trade union was allowed to sue and be sued is different and was to enable the trade union to sue in respect of their property. This will be seen at p 428 where two objects of the Trade Union Act were stated, one of which was:

> ... Another object was this: there was a great difficulty in suing and getting their property from third persons, and one object of the Act was to enable these societies to sue in respect of their property, and also to enable them to hold property, such as a house or office, but it was not intended that the contracts entered into by the members of the society should be made legal contracts inter se, so that courts of justice should interfere to enforce them. ...

[59] The object of EA 1996 obviously differs from England's trade union law then.

[60] Here too, the BOG does not manage revenue or property unlike in the repealed EA 1961 where the governor (for other than primary school) and manager (for primary school) was involved in the administration of the revenues or property or in the management of the educational institution. In EA 1996, the BOG's power and function is limited to administration and management. Further as earlier noted, in the instrument of government of the BOG, management of school property is vested in four trustees and not the BOG per se although such property can remain that of the BOG (para 3.1.1).

[61] In addition, in relation to unincorporated associations/societies, our Societies Act 1966 allows a registered society to own property in its registered name and to sue and be sued through a public officer. In this regard s 9(c) provides as follows:

> 9. Provisions applicable to registered societies.
>
> ...
>
> (c) a society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society;

[62] The aforesaid s 9(c) does not derogate from the common law position that unincorporated associations are non-legal entities. A statute may however in creating an entity confer the legal capacity to sue and be sued. This proposition may be gleaned from *Lee Tak Suan & Anor v Tunku Dato Seri Shahabudin bin Tunku Besar Burhanuddin & Ors* [2009] 4 MLJ 759 where at pp 773–774, the following was said:

> [27] Finally, I have to dispose of Dato' Sithambaram's submission that the club being an unincorporated association, it is not recognised as having any legal existence apart from the members of which it is composed. The submission relies on what O'Connor LJ said in *Currie v Barton The Times*, 12 February 1988, as quoted at p 2 of *Unincorporated Associations: Law and Practice by Jean Warburton* (2nd Ed), as follows:
>
> > Clubs are also unincorporated associations. That phrase in English law means that the law does not recognise the legal existence of this enormous number of organisations which operate in this country in a wide variety of fields.
>
> That statement, however, is about clubs and other unincorporated associations as existing under the common law and ungoverned by statute. It does not apply to unincorporated associations that are governed by statute, such as trade unions in England and Malaysia and registered societies in Malaysia. At p 3 of the book the learned author says this:
>
> > There is no statute law specifically dealing with unincorporated associations. The general law relating to unincorporated associations is judge made. There

A has, however, been statutory intervention in relation to certain types of unincorporated associations, for example, trade unions, to alleviate the difficulties caused by the lack of legal status.

The fact that an unincorporated association is registered under statute is itself legal recognition of its legal existence.

B

[63] The plaintiffs had relied on para 28 of *Lee Tak Suan* that 'the club, is my judgment, a legal entity'. The club there was the Selangor Turf Club which was a registered society registered under s 7 of the Societies Act. Here, the BOG is C not a registered society such that it all goes back to EA 1996.

[64] In respect of *Chen Cheng*, reliance was placed on para 25 at p 815 as follows:

D [25] ... it will be appreciated, readily, that the proper approach in interpreting the Societies Act is to discern from the totality of its provisions whether Parliament intended that an unincorporated association of individuals registered under s 4 thereof as a society should have legal personality such that the society is capable of having an identity separate and distinct from the members who comprise it such that the society is capable of suing or being sued in its registered name even without E the aid of s 5(b) which provides that all societies registered under the Societies Act may sue or be sued in the name in which it was registered.

[65] For the reasons given earlier and even taking the above approach, there F is nevertheless nothing in the entire EA 1996 capable of being construed to render the BOG a legal entity.

[66] To conclude on this issue, we would answer the issue as posed in the negative.

G

Effect of the issue of legal entity and capacity answered in the negative

[67] With the issue of whether the BOG is a legal entity under ss 2 and 53 of the EA 1996 with the legal capacity to sue or be sued being answered in the H negative, we deal with whether the matter can be finally disposed of, or as the plaintiffs sought to submit, that they nevertheless had the locus to sue in their representative capacity such that the matter has to proceed to trial.

[68] The plaintiffs have specifically pleaded themselves as the representatives I of the BOG. In para 5 of the amended statement of claim, they were described as members of the BOG and in para 6, their positions in the BOG was stated. Paragraph 7 then states:

7. Lantaran itu, Plaintif-Plaintif memfailkan tindakan ini didalam kapasiti mereka sebagai ahli-ahli Lembaga tersebut dan untuk dan bagi pihak Lembaga tersebut

dimana pihak Lembaga tersebut telah memberikan kuasa dan hak sepenuhnya kepada Plaintif-Plaintif untuk berbuat demikian.

[69] Although the pleadings were such, it is unclear why the plaintiffs consented to the CA order which was diametrically in contrast to its pleaded position. We cannot over emphasise that the preliminary issues were agreed by consent and as acknowledged by counsel for the plaintiffs, drafted by the counsels concerned. These are focused and specific issues. The CA order does not call upon the court to further consider that in the event the issues are answered in the negative, whether the plaintiffs have the locus to file in their representative capacity, even if that that was how the suit was pleaded. This was how the parties, by consent, chose to frame the preliminary issues such that the suitability of the mode, is no longer an issue.

[70] Order 33 rr 2 and 5 of the RC 2012 provides as follows:

2. Time of trial of questions or issues. (O 33 r 2)

The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

...

5. Dismissal of action after decision of preliminary issue. (O 33 r 5)

If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[71] Reliance was placed by the plaintiffs on the words in O 33 r 5 'or to make such other order or give such judgment therein as may be just'. We however note that r 5 is preceded by the words 'to dismiss the cause or matter'. We would therefore agree with the defendants that given the wording of r 5 in its entirety, the order to be made would not arise if the preliminary issue does not dispose of the cause or matter or render the trial unnecessary.

[72] Here, the issue relates to legal entity and the capacity to sue, giving rise to the maintainability of the suit, such that when the issue is answered in the negative, the only option is to dismiss the action. Hence in *S & M Shopping Arcade Sdn Bhd v CH Williams, Talhar and Wong Sdn Bhd* [2007] 7 MLJ 468 a suit caught by res judicata was dismissed under r 5. In that case, the defendant had raised a preliminary issue to be decided pursuant to O 33 r 5 premised on res judicata.

[73] It was firstly submitted by the plaintiffs that the issue was not framed in a manner that substantially disposes of the cause or matter or renders the trial unnecessary. Reference was made to *Krishnan Rajan a/l N Krishnan v Bank Negara Malaysia & Ors* [2003] 1 MLJ 149 at p 168 as follows:

> Here, in adjudicating encl 16, I found that the issue as framed cannot decisively determine and put an end to the litigation. It is part and parcel of my judgment that even if I were to hold that the BMC Guidelines that was issued by the first defendant is ultra vires — a decision that would favour the plaintiff, yet it would not be decisive as to put an end to the whole suit. The litigation would still continue. The disposal of the proposed question of law as framed in encl 16 will not and cannot render the trial of the action for defamation unnecessary. This court will still have to adjudicate on the issue of defamation. This court too will have to adjudicate on the issue of negligence.

[74] In *Krishnan Rajan*, it was the plaintiff who made the application for the matter to be tried on a preliminary basis. We reiterate that here the preliminary issues were agreed by consent which culminated in the CA order. Therefore the suitability of the mode of O 33 r 2 and r 5 is no longer an issue. In addition, as stated by the court, even if the guidelines were found to be ultra vires, there still is the tort of libel which is to be adjudicated. There were thus two distinct causes of action.

[75] It was next contended that despite parties consenting to the issues to be determined by O 33 r 2, the court still had to consider whether it ought to hear the application. Reliance was placed on the High Court decision of *Ann Joo Steel Berhad v Tenaga Nasional Berhad & Ors* [2016] MLJU 588; [2017] 2 CLJ 199, which the plaintiffs say has been affirmed by the Federal Court and reported as *Ann Joo Steel Bhd v Pengarah Tanah dan Galian Negeri Pulau Pinang & Anor and another appeal* [2020] 1 MLJ 689; [2019] 9 CLJ 153.

[76] At p 206 of the High Court grounds of judgment, this was said:

> [8] Notwithstanding, the parties consented to this application and the procedural requirements of an application under O 14A r 1 of the RC 2012 and O 33 r 2 of the RC 2012 are satisfied, this court has discretion whether to entertain the application. I am satisfied that this application is appropriate considering all the material facts relating to the subject matter of claim are undisputed and admitted and furthermore the outcome of this application will dispose off the case entirely. Before considering the application (encl 51), I peruse and carefully consider all the cause papers filed, including the pleadings and affidavits. This court shall proceed to consider the application.

[77] In our case, not only was there consent by parties with the able representation of counsels, there was a CA order to fortify the consent. Parties presented their case in the High Court premised on the issue of whether the BOG is a legal entity under ss 2 and 53 of the EA 1996 with the legal capacity

to sue or be sued. The HC then proceeded to hear the application and so too did we. It is only when the issue is answered against the plaintiffs that they now change tack to say they have locus to sue in their representative capacity such that the matter has to proceed to trial.

[78] We are of the considered opinion that the above cases referred to by the plaintiffs do not deal with the maintainability of a suit, in the context of legal entity vis a vis legal capacity to sue.

CONCLUSION

[79] Appeal 547 by the plaintiffs is dismissed.

[80] Appeal 553 by the AG is dismissed.

[81] As the defendants had indicated during the hearing on 22 February 2023, that if the principal appeal which is Appeal 547 is dismissed, they would not proceed with their Appeal 570, we strike out Appeal 570.

[82] We make no order as to costs in all these appeals.

Appeals dismissed.

Reported by Ashok Kumar